

AMENDED IN SENATE APRIL 12, 2010

AMENDED IN SENATE MARCH 24, 2010

SENATE BILL

No. 1026

Introduced by Senator Wyland

February 12, 2010

An act to ~~add Section 1347.3 to~~ *amend Section 1347 of the Penal Code, relating to criminal procedure.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1026, as amended, Wyland. Sex offenses: conditional exam of minor victims.

Existing law provides for the examination of witnesses conditionally under certain circumstances, including ~~when a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial.~~ Existing law provides for the contemporaneous examination and cross-examination by closed-circuit television of minor witnesses 13 years of age or younger if the court makes specified findings.

This bill would ~~provide that when a defendant has been charged with a sex offense for which registration as a sex offender is required, the alleged victim, if he or she is under 18 years of age, may be examined conditionally, for any evidentiary proceeding in the case and without the presence of the defendant, upon a finding by the court that emotional trauma to the alleged victim would result if the defendant is present during the examination, as specified~~ *remove the requirement that a witness be a minor 13 years of age or younger.*

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1347 of the Penal Code is amended to
2 read:

3 1347. (a) It is the intent of the Legislature in enacting this
4 section to provide the court with discretion to employ alternative
5 court procedures to protect the rights of a ~~child~~ witness, the rights
6 of the defendant, and the integrity of the judicial process. In
7 exercising its discretion, the court necessarily will be required to
8 balance the rights of the defendant or defendants against the need
9 to protect a ~~child~~ witness and to preserve the integrity of the court's
10 truthfinding function. This discretion is intended to be used
11 selectively when the facts and circumstances in the individual case
12 present compelling evidence of the need to use these alternative
13 procedures.

14 (b) Notwithstanding any other law, the court in any criminal
15 proceeding, upon written notice by the prosecutor made at least
16 three days prior to the date of the preliminary hearing or trial date
17 on which the testimony of the ~~minor~~ witness is scheduled, or during
18 the course of the proceeding on the court's own motion, may order
19 that the testimony of a ~~minor 13 years of age or younger~~ a witness
20 at the time of the motion be taken by contemporaneous examination
21 and cross-examination in another place and out of the presence of
22 the judge, jury, defendant or defendants, and attorneys, and
23 communicated to the courtroom by means of closed-circuit
24 television, if the court makes all of the following findings:

25 (1) The ~~minor's~~ witness' testimony will involve a recitation of
26 the facts of any of the following:

27 (A) An alleged sexual offense committed on or with the ~~minor~~
28 witness.

29 (B) An alleged violent felony, as defined in subdivision (c) of
30 Section 667.5, of which the ~~minor~~ witness is a victim.

31 (C) An alleged felony offense specified in Section 273a or 273d
32 of which the ~~minor~~ witness is a victim.

33 (2) The impact on the ~~minor~~ witness of one or more of the
34 factors enumerated in subparagraphs (A) to (E), inclusive, is shown
35 by clear and convincing evidence to be so substantial as to make
36 the ~~minor~~ witness unavailable ~~as a witness~~ unless closed-circuit
37 testimony is used.

1 (A) Testimony by the ~~minor~~ *witness* in the presence of the
2 defendant would result in the ~~child~~ *witness* suffering serious
3 emotional distress so that the ~~child~~ *witness* would be unavailable
4 as a witness.

5 (B) The defendant used a deadly weapon in the commission of
6 the offense.

7 (C) The defendant threatened serious bodily injury to the ~~child~~
8 *witness* or the ~~child's~~ *witness's* family, threatened incarceration or
9 deportation of the ~~child~~ *witness* or a member of the ~~child's~~ *witness's*
10 family, threatened removal of the ~~child~~ *witness* from the ~~child's~~
11 *witness's* family, or threatened the dissolution of the ~~child's~~ *witness's*
12 family in order to prevent or dissuade the ~~minor~~ *witness* from
13 attending or giving testimony at any trial or court proceeding, or
14 to prevent the ~~minor~~ *witness* from reporting the alleged sexual
15 offense, or from assisting in criminal prosecution.

16 (D) The defendant inflicted great bodily injury upon the ~~child~~
17 *witness* in the commission of the offense.

18 (E) The defendant or his or her counsel behaved during the
19 hearing or trial in a way that caused the ~~minor~~ *witness* to be unable
20 to continue his or her testimony.

21 In making the determination required by this section, the court
22 shall consider the age of the ~~minor~~ *witness*, the relationship
23 between the ~~minor~~ *witness* and the defendant or defendants, any
24 handicap or disability of the ~~minor~~ *witness*, and the nature of the
25 acts charged. The ~~minor's~~ *witness's* refusal to testify shall not alone
26 constitute sufficient evidence that the special procedure described
27 in this section is necessary to obtain the ~~minor's~~ *witness's* testimony.

28 (3) The equipment available for use of closed-circuit television
29 would accurately communicate the image and demeanor of the
30 ~~minor~~ *witness* to the judge, jury, defendant or defendants, and
31 attorneys.

32 (c) If the court orders the use of closed-circuit television,
33 two-way closed-circuit television shall be used, except that if the
34 impact on the ~~minor~~ *witness* of one or more of the factors
35 enumerated in subparagraphs (A) to (E), inclusive, of paragraph
36 (2) of subdivision (b), is shown by clear and convincing evidence
37 to be so substantial as to make the ~~minor~~ *witness* unavailable-as-a
38 *witness* even if two-way closed-circuit television is used, one-way
39 closed-circuit television may be used. The prosecution shall give
40 the defendant or defendants at least 30 days' written notice of the

1 prosecution's intent to seek the use of one-way closed-circuit
2 television, unless good cause is shown to the court why this 30-day
3 notice requirement should not apply.

4 (d) (1) The hearing on a motion brought pursuant to this section
5 shall be conducted out of the presence of the jury.

6 (2) Notwithstanding Section 804 of the Evidence Code or any
7 other law, the court, in determining the merits of the motion, shall
8 not compel the minor to testify at the hearing; nor shall the court
9 deny the motion on the ground that the ~~minor witness~~ has not
10 testified.

11 (3) In determining whether the impact on an individual ~~child~~
12 *witness* of one or more of the five factors enumerated in paragraph
13 (2) of subdivision (b) is so substantial that the ~~minor witness~~ is
14 unavailable ~~as a witness~~ unless two-way or one-way closed-circuit
15 television is used, the court may question the ~~minor witness~~ in
16 chambers, or at some other comfortable place other than the
17 courtroom, on the record for a reasonable period of time with the
18 support person, the prosecutor, and defense counsel present. The
19 defendant or defendants shall not be present. The court shall
20 conduct the questioning of the ~~minor witness~~ and shall not permit
21 the prosecutor or defense counsel to examine the ~~minor witness~~.
22 The prosecutor and defense counsel shall be permitted to submit
23 proposed questions to the court prior to the session in chambers.
24 Defense counsel shall be afforded a reasonable opportunity to
25 consult with the defendant or defendants prior to the conclusion
26 of the session in chambers.

27 (e) When the court orders the testimony of a ~~minor witness~~ to
28 be taken in another place outside of the courtroom, the court shall
29 do all of the following:

30 (1) Make a brief statement on the record, outside of the presence
31 of the jury, of the reasons in support of its order. While the
32 statement need not include traditional findings of fact, the reasons
33 shall be set forth with sufficient specificity to permit meaningful
34 review and to demonstrate that discretion was exercised in a
35 careful, reasonable, and equitable manner.

36 (2) Instruct the members of the jury that they are to draw no
37 inferences from the use of closed-circuit television as a means of
38 facilitating the testimony of the ~~minor witness~~.

1 (3) Instruct respective counsel, outside of the presence of the
2 jury, that they are to make no comment during the course of the
3 trial on the use of closed-circuit television procedures.

4 (4) Instruct the support witness, outside of the presence of the
5 jury, that he or she is not to coach, cue, or in any way influence
6 or attempt to influence the testimony of the ~~minor~~ witness.

7 (5) Order that a complete record of the examination of the ~~minor~~
8 witness, including the images and voices of all persons who in any
9 way participate in the examination, be made and preserved on
10 videotape in addition to being stenographically recorded. The
11 videotape shall be transmitted to the clerk of the court in which
12 the action is pending and shall be made available for viewing to
13 the prosecuting attorney, the defendant or defendants, and his or
14 her attorney during ordinary business hours. The videotape shall
15 be destroyed after five years have elapsed from the date of entry
16 of judgment. If an appeal is filed, the tape shall not be destroyed
17 until a final judgment on appeal has been ordered. Any videotape
18 that is taken pursuant to this section is subject to a protective order
19 of the court for the purpose of protecting the privacy of the witness.
20 This subdivision does not affect the provisions of subdivision (b)
21 of Section 868.7.

22 (f) When the court orders the testimony of a ~~minor~~ witness to
23 be taken in another place outside the courtroom, only the ~~minor~~
24 witness, a support person designated pursuant to Section 868.5, a
25 nonuniformed bailiff any technicians necessary to operate the
26 closed-circuit equipment, and, after consultation with the
27 prosecution and the defense, a representative appointed by the
28 court, shall be physically present for the testimony. A videotape
29 shall record the image of the ~~minor~~ witness and his or her
30 testimony, and a separate videotape shall record the image of the
31 support person.

32 (g) When the court orders the testimony of a ~~minor~~ witness to
33 be taken in another place outside the courtroom, the ~~minor~~ witness
34 shall be brought into the judge's chambers prior to the taking of
35 his or her testimony to meet for a reasonable period of time with
36 the judge, the prosecutor, and defense counsel. A support person
37 for the ~~minor~~ witness shall also be present. This meeting shall be
38 for the purpose of explaining the court process to the ~~child~~ witness
39 and to allow the attorneys an opportunity to establish rapport with
40 the ~~child~~ witness to facilitate later questioning by closed-circuit

1 television. No participant shall discuss the defendant or defendants
2 or any of the facts of the case with the ~~minor~~ *witness* during this
3 meeting.

4 (h) When the court orders the testimony of a ~~minor~~ *witness* to
5 be taken in another place outside the courtroom, nothing in this
6 section prohibits the court from ordering the ~~minor~~ *witness* to be
7 brought into the courtroom for a limited purpose, including the
8 identification of the defendant or defendants as the court deems
9 necessary.

10 (i) The examination shall be under oath, and the defendant or
11 defendants shall be able to see and hear the ~~minor~~ *witness*, and if
12 two-way closed-circuit television is used, the defendant's image
13 shall be transmitted live to the witness.

14 (j) Nothing in this section affects the disqualification of
15 witnesses pursuant to Section 701 of the Evidence Code.

16 (k) The cost of examination by contemporaneous closed-circuit
17 television ordered pursuant to this section shall be borne by the
18 court out of its existing budget.

19 (l) Nothing in this section shall be construed to prohibit a
20 defendant from being represented by counsel during any
21 closed-circuit testimony.

22 ~~SECTION 1. Section 1347.3 is added to the Penal Code, to~~
23 ~~read:~~

24 ~~1347.3. Notwithstanding any other law, when a defendant has~~
25 ~~been charged with an offense specified in subdivision (c) of Section~~
26 ~~290, the alleged victim, if he or she is under 18 years of age, may~~
27 ~~be examined conditionally, for any evidentiary proceeding in the~~
28 ~~case and without the presence of the defendant, upon a finding by~~
29 ~~the court, supported by an examination and report of a qualified~~
30 ~~psychologist or psychiatrist, that emotional trauma to the alleged~~
31 ~~victim would result if the defendant is present during the~~
32 ~~examination.~~